



Active Environment Team v Seascan Energy Ltd & another; National Environment Management Authority & 5 others (Interested Parties) (Environment & Land Petition E035 of 2022) [2024] KEELC 4801 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E035 OF 2022
SM KIBUNJA, J
JUNE 19, 2024**

BETWEEN

ACTIVE ENVIRONMENT TEAM PETITIONER

AND

SEASCAN ENERGY LTD 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

THE NATIONAL LANDS COMMISSION INTERESTED PARTY

KENYA AIRPORTS AUTHORITY INTERESTED PARTY

KENYA PIPELINE COMPANY INTERESTED PARTY

KENYA PORTS AUTHORITY INTERESTED PARTY

ENERGY & PETROLEUM AUTHORITY INTERESTED PARTY

RULING

1. The 2nd respondent has filed a notice of preliminary objection dated 6th February 2023 against the petition herein on the following grounds:

1. “That the Petitioner has not exhausted all legal avenues available to ventilate the issues raised in the Petition, specifically under Regulations 4 and 5 of the *National Land Commission (Review of grants and Dispositions of Public Land) Regulations, 2017*, hence this is not the correct forum for the dispute.



2. That the Petitioner is not a legal person capable of suing or being sued.
 3. That the Verifying affidavit is sworn by a stranger.
 4. That the Petition herein is incurably defective.
 5. That this Honourable court lacks jurisdiction to entertain the Petition herein.”
2. On 3rd October 2023, 20th November 2023, 24th January 2024 and 11th April 2024, the court issued directions on filing and exchanging submissions on the preliminary objection. The learned counsel for the 2nd respondent and the Petitioner filed their submissions dated the 14th December 2023 and 13th May 2024 respectively, which the court has considered.
 3. The following issues are of relevance for determination of this application and they are as follows:
 - i. Whether the grounds on the notice of preliminary objection dated the 6th February 2023 raises pure points of law that if upheld, would determine the petition.
 - ii. Who bears the costs?
 4. The court has carefully considered the grounds on the notice of preliminary objection dated 6th February 2023, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. In the case of *Oraro v Mbaja* [2005] KLR 141 the court quoted the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696 and went on to state as follows about preliminary objections:

“ A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

- b. The first ground raised by the 2nd respondent in their preliminary objection is that the Petitioner did not exhaust all legal avenues available to ventilate the issues raised especially as provided under Regulation 4 and 5 of the *National Land Commission (Review of Grants and Dispositions of Public Land) Regulations*, 2017. Regulation 4 provides that:

“ The Commission shall subject to section 14 of *the Act* have the power to review all grants or dispositions of public land to establish their propriety or legality on its own motion or upon a complaint by the national or a county government, a community or an individual.”

Section 14 of the *National Land Commission Act* No. 5 of 2012, provides as follows:

“



- “(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
- (2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).
- (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
- (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
- (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
- (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
- (7) No revocation of title shall be effected against a *bona fide* purchaser for value without notice of a defect in the title.
- (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.
- (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).”

Regulation 5 provides as follows:

- “(1) The national government, a county government, community, or an individual may pursuant to section 14(1) present a complaint to the Commission in Form NLC01 set out in the First Schedule.
- (2) A complaint may be accompanied by such documents as may be necessary to support the complaint.
- (3) Where the complaint is made orally or otherwise by a complainant who cannot read or write, the complaint shall be reduced into writing by a designated officer of the Commission in Form NLC01 set out in the First Schedule.
- (4) The Commission shall acknowledge each complaint received by placing a mark of a stamp on the form.
- (5) A complaint shall be lodged to the Commission free of charge.



- (6) Upon receiving a complaint, the Commission shall vet the complaint confirm that the complaint has been made in accordance with these Regulations.
 - (7) Where the complaint is in accordance with the Regulations, the Commission shall consider the complaint and—
 - (a) admit the complaint and commence the review process;
 - (b) consolidate the complaint with others of a similar nature;
 - (c) advise the complainant, in writing, that the matter does not necessitate a review;
 - (d) advise the complainant, in writing, that the matter is not within the mandate of the Commission; or
 - (e) advise the complainant that the matter lies for determination by another body or institution.”
- c. The petition dated 23rd September 2022 is about public land which was unsurveyed, and was registered under the 2nd respondent and had been leased by the same to the 1st respondent for a period of 45 years, with an option to renew. The suit property is approximately 10 acres and the petitioner contends that both the 1st and 2nd respondent did not follow the National Land Commission regulations. The 1st interested party opposed the petition through grounds of opposition dated 11th October 2022 stating that the suit was res sub judice to National Environment Tribunal appeal 34 of 2022. This fact is also a pure point of law which ought to have been raised in the notice of preliminary objection herein, but was not.
- d. The facts of the petition as it stands are unchallenged. Counsel for the 1st respondent argued that the Petitioner’s grievances ought to have been tabled before the National Land Commission before being brought to this court, while counsel for the petitioner argued that there are certain constitutional and statutory violations which are matters beyond the scope of the National Land Commission, and can only be addressed in this court. Each cited precedents in their favour and therefore the question that therefore stands out is what are the grievances raised and prayers by the Petitioner.
- e. Looking at the said petition, the main remedy sought for is a permanent injunction restraining the 1st respondent from using the suit property for an LPG project. Counsel for the 1st Respondent submits that this suit offends the principle of constitutional avoidance, and I am guided by the decision in the case of Valentine Odhiambo & 2 others v HF Development & Investment Ltd & another [2021] eKLR where the court stated as follows:

“The 2nd Respondent supports the Preliminary Objection raised by the 1st Respondent. The 2nd Respondent cited the Supreme Court in petition No. 14 of 2014 *Communication Commission of Kenya v Royal Media Service Ltd & 5 Others*. In the petition, the Court defined, the principle of avoidance also known as “Constitutional avoidance”.

The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The Supreme Court



quoted with approval, the South African case in *S vs Mblungu*, 1995 (3) SA 865 (CC) where Kentridge A.J articulated the principle of avoidance as follows:-

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.”

Counsel for the petitioner has claimed that the remedies sought by the petitioner cannot be issued by the National Land Commission, and hence the petition is properly before this court. I am however not convinced by this argument as Regulation 5 (7) (e) of the aforementioned *Regulations* give the Commission the power to determine a matter or wash its hands of the same. It is this court’s firm belief that the petitioner should have first filed the matter with the National Land Commission, and the filing of this petition is therefore, premature and an abuse of the court process.

f. The court in *Valentine case* [*supra*] had also held:

“In *COD and Another Vs Nairobi City water & Sewerage Company* (petition 419 of 2015 (2015) eKLR the Court held that the *Constitution* cannot be used as a general substitute for normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the High court under article 163. The Court sitting as a constitutional Court must through the doctrine of avoidance steer clear of determining disputes as if there were constitutional questions being raised.”

I need not say more on the above. I find that the Petitioner has ran afoul to the doctrine of constitutional avoidance, and the court is without jurisdiction in this matter at this stage.

- g. The grounds of whether or not the petitioner is a legal person capable of being of suing and being sued; whether the verifying affidavit is sworn by a stranger; and whether the petition is incurably defective raises issues that cannot be determined without affording the parties the opportunity to present evidence before the court makes a decision one way or the other. The said grounds do not raise pure points of law and are rejected.
- h. Section 27 of the *Civil Procedure Act* states the general rule on costs which is that costs follow the even unless there are good reasons to depart form this rule.

5. The findings above show that the orders that should issue are as follows:

- a. That the notice of preliminary objection dated 6th February 2023 is upheld, and the petition dated the 23rd September 2022, is consequently struck out.
- b. Costs to be borne by the Petitioner.
- Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF JUNE 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Petitioner : No appearance.



Respondents : Mr Ngaine for 2nd Respondent

Interested Parties : No appearance.

S. M. Kibunja, J.

ELC MOMBASA.

